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Supreme Court, U.S.
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NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BEULAH W. BOOKER,
PETITIONER

versus

EVELYN MOBLEY, M.D.
RESPONDENT

ON PETITION FOR APPEAL TO THE
UNITED STATES SIXTH CIRCUIT

PETITION FOR CERTIORARI

BEULAH W. BOOKER
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DAYTON, OHIO 45408

43pp

EDITOR'S NOTE

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QUESTION PRESENTED

When a trial judge holds a pre-trial conference with the defendant without notifying plaintiff to be represented and change the original complaint of negligence to medical malpractice, does this violates plaintiff Constitutional Rights. Other judgments were affected by the common pleas court judgment.

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OPINIONS BELOW

The opinion of the United States Sixth Circuit Court of Appeals is reported at Booker v. Mobley, case no. 85-3568 (Ohio 1986). The opinion of the U. S. District Court for the Southern District of Ohio Western Division is reported at Booker v. Mobley, case no. C-3-85-454 (Ohio 1985). Other relevant state court opinions involving the same Respondent can be found at Booker v. Mobley, case no. 9074 (c.p. #83-2237) (Ohio 1984-1985).

JURISDICTION

The opinion of the United States Court of Appeals was rendered on January 15, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent parts:

> Congress shall make no law abridging the freedom of speech or the right of the people to petition the Government for a redress of grievances.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than

according to the rules of the common law.

The Thirteeneth Amendment to the United States Constitution provides in pertinent part:

> Neither slavery nor involuntary servitude, shall exist within the United States any place subject to their jurisdiction.

The Fourteeneth Amendment of the United States Constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In May-June 1982, Petitioner was injured at her place of employment, Delco Moraine, General Motors Corporation, the the Respondent is it's Plant Medical Director who refused to have Petitioner removed from a job that caused her severe injuries; according to the Contract between U.A.W. & G.M.C. "any employee who has been incipacitated at regular work by injury or compensable

occupational disease while employed by the Corporation will be employed in other work on a job that is operating in the plant which he can do." Petitioner received severe injuries to her hands which resulted in an operation on the right hand and pending surgery for the left hand. During the time Petitioner was being injured, she was also being disciplinary with the balance and up to thirty days off without pay, the next step was to be fired. Respondent had been warned by Petitioner and six other doctors about the severity of her hands in trying to perform the assigned job.

On August 17, 1983, Petitioner filed a negligence complaint in the Montgomery County Common Pleas Court Booker v. Mobley, case no. 83-2237 (Ohio 1983) O.C.R. 2305.10 bodily injury. The complaint was set up for a pre-trial con-

ference on October 14, 1983, and was heard by Judge John Kessler Bailiff on orders from the judge. At this hearing a jury trial date was set for March 12, 1984, which was agreeded upon by the Petitioner and Respondent. On December 9, 1983, a second pre-trial conference was held without notifying Petitioner. At this hearing, the complaint of negligence with a jury trial was changed to medical malpractice with an arbritrator, who was pick from Respondent's attorney building. Judge John Kessler dismissed the case stating Statute of Limitation of one (1) year. Petitioner filed a notice of appeal to the Court of Appeal of Montgomery County, Ohio Booker v. Mobley, case no. 9074, and stated that the statute of limitation had not ran out. The statute of limitation for negligence is two years, also that the Respondent

is not listed with the Dayton Medical Society as a licensing practing physician nor did she diagnosis or treat Petitioner as her patient. Petitioner received a report of her injuries on October 4, 1983, three months after surgery. Petitioner stated that her rights was violated in the lower court when she was not notified of the second pre-trial conference. The appeal court affirmed the lower court dismissal.

Petitioner filed a complaint of discrimination in the United States District Court for the Southern District of Ohio, Western Division, Booker v. Mobley case no. C-3-85-454, stating she was denied and could not enforce her equal civil rights in state courts; citing the Civil Rights Bill of 1964, 42 U.S.C. 1981 & 1983, and 28 U.S.C. 1443 (1). The District Court dismissed the case

sua sponte, for want of subject matter jurisdiction. Petitioner appeal to the United States Court of Appeals for the Sixth Circuit Booker v. Mobley, case no. 85-3568 (Ohio 1985). The Court of Appeals of the Sixth Circuit affirmed the District Court dismissal.

REASONS WHY THE WRIT SHOULD BE GRANTED

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS OF GEORGIA DECIDED THE DEFENDANTS HAD A RIGHT TO BE HEARD IN GEORGIA v. RACHEL, U.S. 384, n. 147, 780, IN A MANNER IN CONFLICT IN STATE AND FEDERAL COURTS.

Petitioner injured her hands while working her assinged job at Delco-Moraine, G.M.C. She had surgery in

July 1983. She filed a negligence complaint against the Respondent in the Montgomery County Common Pleas Court Booker v. Mobley, supra,. The state court changed the complaint from negligence to medical malpractice after it had been set-up for a jury trial. The state court dismissed the case for one (1) year statute of limitation, O.C.R. 2305.11. However, 2305.10 O.C.R. bodily injured or injury to person property when certain action arises , the statute of limitation for negligence is two (2) years, as in Wilson v. Garcia, 105 SCT 1938 85 Led (2d) 254 (1985). Also in Daugherty v. Doe, 14 App (3d) 258, 14 OBR 287, 470 NE (2d) 909 Hamilton 1984) negligence actions against a dentists were subject to two-year statute of limitations provided for a bodily injury action under O.R.C. 2305.10

However, if the case was a medical malpractice as in McMinn v. D. V. Ramani;, M.D. & Associates, 20 App (3d) 167, 20, O.B.R. 485, NE (2d) (Summit 1984), the statute of limitations for a cause of action in malpractice arising from the negligence performance of a psychiatric evaluations the caused accures when the report is released. In Smith v. Loeffler, 20 App (3d) 66, 20 OBR 70, 484 NE (2d) 185 (Summit 1984), a plaintiff with a cause of action for medical malpractice which arose before the effective date of O.R.C. 2305.11 but who discovered the injury only after the effective date must be allowed one year after the discovery in which to bring her claim. Whether the complaint was for negligence or medical malpractice, petitioner was within the time limit to file her complaint. Petitioner was injured in

May-June 1982, and had surgery in July, 1983. She filed a negligence complaint in August, 1983. She received her medical report from her surgeon in October 1983, which stated the injuries came from the job she was performing at work.

The state courts dismissed Petitioner complaint and denied her equal civil rights and due process of law when they refused to notify her of the second pre-trial conference. They denied her representation. Petitoner filed a complaint of discrimination in the United States District Court for the Southern District of Ohio Booker v. Mobley, supra, stating she was denied and could not enforce her equal civil rights in state courts as in Georgia v. Rachel, supra,. In 28 U.S.C. 1443 (1964ed) (1) & (2) states civil rights cases provides;

1. Against any person who is

denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the U.S.A. or of all persons within the jurisdiction thereof.

2. For any act under color of authority derived from any law providing for equal rights or for refusing to do any act on the ground that it would be inconsistent with such law.

In Georgia v. Rachel, supra, Thomas Rachel and nineteen others filed a petition to transfer their case to the United States District Court for the Northern District of Georgia. In Mr. Justice Steward opinion of the court; he stated that this case presents

questions concerning the scope of a century-old federal law that permits a defendant in state court proceedings to transfer his case to a federal court under certain condition as in 28 U.S.C. 1443 (1964ed) in pertinent parts; a-gainst any person who is denied and cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States. Petitioner was denied Civil Action for Deprivation of Rights, 42 U.S.C. 1983, also the Four-teeneth Amendment with it's due process clause are sufficient examples that con-fer equal rights in the sense vital to our way of life of bestowing them upon all, New York v. Galamison, 342 f. 2d 255, 269, 271, also she was denied the First Amendment in parts; the freedom of speech or the right to petition the

Government for a redress of grievance; and the Seventh Amendment in part; a jury trial.

CONCLUSION

We pray Certiorari should be granted to resolve the question left unanswered whether the complaint is a negligence which has a statute of limitation of two years or whether the complaint is a medical malpractice which has a statute of limitation of one year. Certiorari should be granted because Petitioner rights were violated. Georgia v. Rachel,supra,.

Respectfully submitted,
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Petitioner

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-3568

BEULAH W. BOOKER, Petitioner,

vs.

EVELYN MOBLEY, M.D., Respondent

(January 15, 1986)

BEFORE: Jones and Nelson, Circuit Judges; and Peck, Senior Circuit Judge

Plaintiff is appealing from a judgment dismissing her civil action for lack of subject matter jurisdiction. The appeal has been referred to a panel of the Court Pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon consideration of the record and briefs, this panel agrees unanimously that oral argument is

not needed. Rule 34(a), Federal Rules of Appellate Procedure. The record shows that plaintiff is an employee of Delco-Moraine Division, General Motors Corporation, at its plant located in Dayton, Ohio. Defendant is a physician and the plant medical director for said employer. The complaint alleges that plaintiff received injuries to her wrists and forarms as a result of her work and that defendant was negligent in treating her injuries. Plaintiff aslo claims that in a prior state action, the court dismissed her suit because she was black, thereby violating the Equal Protection Clause. The district court dismissed plaintiff's case sua sponte. Upon consideration, we agree with the district court's conclusion that it lacked jurisdiction to consider plaintiff's claims. Therefore, it is ORDERED that the judgment below be

affirmed for the reasons stated by the district court in its memorandum opinion of June 28, 1985. Rule 9(d)(2) Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT.

John P. Lehman, Clerk

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

No. C-3-85-454

BEULAH BOOKER, Petitioner,

vs.

EVELYN MOBLEY, M.D., Respondent.

(June 2, 1985)

ENTRY DISMISSING PLAINTIFF'S COMPLAINT, SUA SPONTE, FOR WANT OF SUBJECT MATTER JURISDICTION; TERMINATION ENTRY

The filing of this case represents the second time that Plaintiff, Beulah Booker, has initated an action in this Court seeking damages from Defendant, Evelyn Mobley, M.D. for latter's alleged

medical malpractice. See Booker v. Mobley, Case no. C-3-83-1299 (S. D. Ohio). As with the earlier lawsuit, this Court sua sponte dismisses Plaintiff's complaint without prejudice for want of subject matter jurisdiction. Plaintiff's action in this Court have shadowed a medical malpractice action which Plaintiff has pursued against Defendant in state court ("state court proceedings"). See Booker Mobley, Case No. 83-2237 (Mont. Cty.). When Plaintiff becomes dissatisfied with the rulings made in the state court proceedings, she initates an action in this Court. The fatal flaw in Plaintiff's method of proceeding is that this Court is totally devoid of subject matter jurisdiction. Diversity does not exist between Plaintiff and Defendant; therefore, diversity cannot serve as a basis

for jurisdiction. See 28 U.S.C. #1332. also, for reasons that follwo, the Court concludes that it has neither "federal question" nor removal jurisdiction over this case. See 28 U.S.C. ##1331, 1441, 1443. Although Plaintiff has checked "Federal Question" as the basis of jurisdiction on her civil cover sheet, her complaint does not specifically state what federal question it raises. In other words, Plaintiff does not specifically state what federal law or constitutional provision her claim arises under. However, the Court concludes, from reading of the complaint, that the Plaintiff is asserting deprivations of her constitutional rights, namely equal protection of the laws, and the right to jury trial in civil cases guaranteed by the Seventh Amendment. This Court is firmly convinced that Plaintiff does

not, or could she, state a civil rights claim over which this Court has jurisdiction. It is apparent that the Plaintiff does not contend that the Defendant personally deprived her of equal protection or of any other civil right. The only claims that Plaintiff asserts against Defendant arise out of the medical treatment she received from the Defendant. On the other hand, Plaintiff's civil rights claims arise out of the conduct of the state court action. Plaintiff alleges that in the state court action she was deprived of equal protection and her Seventh Amendment right to a jury trial was violated. Thus, the Plaintiff is in effect "appealing" certain rulings made in the state court proceedings to this Court. Without question, this Court is without jurisdiction to review the decisions of state courts under the guise of

a civil rights action. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Such review may be had only in the United States Supreme Court. 28 U.S.C. #1257. Furthermore, 28 U.S.C. #1443, which authorizes a defendant to remove an action from state court to federal court when that person "cannot enforce in (the state court) a right under any law providing for the equal civil rights of citizens of the United States," does not serve as a basis for jurisdiction over the present case because 1443 is limited by its own language to defendants. See Hull v. Jackson County Circuit Court, 138 F.2d 820 (6th Cir. 1943). The Plaintiff herein is the Plaintiff in the state court proceedings. Based upon the foregoing, the Court concludes that it is totally devoid of subject matter jurisdiction over the present

case, whether such jurisdiction is based on diversity of citizenship, a federal question or removal. Accordingly, the Court hereby dismisses the above captioned cause, sua sponte, for want of subject matter jurisdiction.[2] The captioned cause is hereby ordered terminated upon the docket records of the United States District Court, Southern District of Ohio, Western Division, at Dayton.

WALTER H. RICE

UNITED STATES DISTRICT JUDGE

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[2]This court is well aware the the Sixth Circuit has recently circumscribed the authority of the district court to enter sua sponte dismissals. See e.g. Morrison v. Tomano, 755 F.2d 515 (6th Cir. 1985); Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983).

APPENDIX "C"

COURT OF APPEALS OF

MONTGOMERY COUNTY, OHIO

No. 9074

BEULAH W. BOOKER, Petitioner,

vs.

EVELYN MOBLEY, M.D., Respondent

(April 3, 1985)

BROGAN, P. J.

Beulah W. Booker (appellant), acting both at trial and on appeal on her own behalf, brings this appeal seeking our review of the dismissal by the trial court of this action as being a medical malpractice claim as per R.C. 2305.11 (D) (3) which was not brought within the one year statute of limitations period set forth in R.C. 2305.11 (A). The facts which form the basis of this appeal follow:

On September 23, 1980, appellant suffered a job-related injury to her right hand. Surgery performed by a Dr. Jenkins on March 23, 1981. Dr. Jenkins allowed appellant to return to work under restricted work duties. Appellant was at all relevant times employed by General Motors at its Delco Moraine Division (Delco Moraine). On May 11, 1982, while working at a position known as "the divider plate job," appellant began to experience severe pain in her hands. Appellant went to see appellee, who is the Plant medical director at Delco Moraine, to explain the pain she was suffering and to request her assistance in obtaining reassignment to a different position. Her complaint further alleges: (sis) "...Plaintiff Doctors written statements to Dr. Mobley explaining she was being hurt severely and if she was

was not taken off that job, the severity of her condition would worsen and it did. Being a doctor, Dr. Mobley was fully aware of plaintiff pain, swelling, numbness and suffering because plaintiff doctors, Drs. Jenkins, Tytko and Martinez plus St. Elizabeth Emergency Center written reports that the plaintiff was being injured more with pain and suffering. Drs. Kutz, Brown and Reynolds and other doctors had explained in their findings that she was injured. The defendant, Dr. Mobley, refused to honor the plaintiff Doctor's statements and ordered her to continued during jobs that was making her hands hurt more with tenderness, soreness, numbness and pain. Being a Doctor, the defendant knew better and was told better..... Plaintiff states that as a direct proximate result of defendants negligence, plaintiff sustained personal injuries resulting in pain and

suffering, loss of income in excess amount of eleven thousand and eight hundred dollars. "Plaintiff states that as a direct and proximate result of defendants negligence, plaintiff has sustained a permanent injury to her left and right hand/wrist/forearm resulting in partial and permanent disabilities, past and future medical expenses..." For these injuries, appellant seeks one mission dollars in damages.

In her answer filed September 13, 1983, appellee denied all allegations to the complaint except the allegations that appellant was employed at Delco Moraine and that she suffered an injury on September 23, 1980. Appellee further set forth the following defenses: The complaint fails to state a claim upon which relief may be granted; the claims are barred by virtue of R.C. 4123.74 and 4123.74.1 (immunity under the workers' comp-

pensation laws); the claims are barred by the defense of laches; and appellant was contributorily negligent. On December 9, 1983, the trial court, sua sponte, determined the case "to be a medical malpractice claim as defined in O.C.R. 2305.11(D)111" The court referred the case to arbitration pursuant to R.C. 2711.21 and Local Rule 2.55. R.C. 2305.11(D)(3) defines "medical claim" as "any claim asserted in any civil action against a physician;;;arising out of the diagnosis, care, or treatment of any person."

On August 31, 1984, apellee filed a motion for summary judgment to Civ. R. 56 stating that appellant's claim is barred by R.C. 2305.11 (A), the one year statute of limitations for medical malpractice claims. In support, appellee states that appellant went on sick leave from work due to her hands following June 16, 1982;

that this is the latest date on which she discovered or should have discovered her condition; Oliver v. Kaiser Community Health Found. (1983) , 5 Ohio St. 3d 111, Syllabus; that, therefore, this is the latest date upon which it can be argued that her cause of action accrued; and therefore the filing date of appellant's complaint being more than one year thereafter, the action is barred. In the alternative, appellee requested a stay of proceedings until after the Industrial Commission of Ohio had ruled on appellant's workers' compensation claim. Finding that this action was not filed within the one year limitation of R.C. 2305.11 (A), the trial court dismissed this case on September 28, 1984. Throughout the pendency of the case, appellant argued her action was for negligence and not malpractice.

On October 9, 1984, appellant filed her notice of appeal. Appellant argues in her first assignment of error that the trial court erred in dismissing her case. The decisive issue is whether or not appellant's action is an action for malpractice as opposed to negligence. If so, then the court was correct in dismissing the case due to the statute of limitations found in R.C. 2305.11 (A). If not, then the court erred since the applicable statute of limitations would be R.C. 2305.10 allowing an action to be brought within two years of the accrual of the cause of action, and this case must be remanded for further proceedings. For the following reasons, we find that appellant's complaint does set forth a medical malpractice claim.

From what appears in her complaint and other pleadings, appellant sought

out appellee to have appellee in her role as plant medical director make a determination that appellant should not continue working at the divider plate job. Appellant presented appellee with her own doctors' reports and asked appellee to exercise her medical judgment in evaluating these reports to arrive at the same medical conclusion as they had. The complaint in essence states that due to a failure in appellee's medical judgment, she did not arrive at this conclusion and as a result, appellant was injured. This alleged failure to exercise good medical judgment by not supporting appellant's request to be taken off the divider plate job constitutes a "claim...against a physician...arising out of the diagnosis, care, or treatment of any person." As the complaint alleges a mis-diagnosis or failure to render proper care or treat-

ment (i.e. assisting in obtaining the reassignment of appellant to another position) it is a claim of medical malpractice under R.C. 2305.11 (D) (3). We find that appellant discovered or in the exercise of due diligence should have discovered her injury on or before June 16, 1982. Oliver, supra, but did not file her complaint until August 17, 1983. Thus the statute of limitations of R.C. 2305.11 (A) had run. Although we are of the opinion that the court could have rendered a judgment on the pleadings, it did not err in granting a motion for summary judgment. This assignment of error is therefore not well taken. For her second assignment of error, appellant states that the trial court erred in not giving appellant equal protection of the law. We do not find that the trial court in any way violated appellant's equal

protection rights. This assignment of error is therefore without merit.

Appellant cites as her third assignment of error, the trial court's refusal to give her a jury trial. In support of this assignment, appellant correctly argues that both feder and Ohio law provides for jury trials over civil disputes in certain circumstances. Her argument, however, overlooks the mandatory provisions of R.C. 2711.21 which provide in pertinent part:

"(A) Upon the filing of any medical claim as defined in division (D) (3) of section 2305.11 of the Revised Code, the controversy shall be submitted to an arbritration board..."

This is therfore unlike the situation argued by appellant where the parties upon agreement may submit themselves to arbritration. We therefore find that the court did not err when it origina-

lly referred this case to medical arbritration rather than directly to a jury trial. Further, any error would be of no avail as the action was properly dismissed for not having been brought within the statutory period. This assignment of error is overruled. Finally, appellant states the trial court erred "in not considering the Civil Rights Act of 1866." We find that the Civil Right Act of 1866 have no bearing on this case, therefore the trial court did not commit error by not considering them. Therefore this assignment of error is also without merit. The judgment of the trial court dismissing this action is affirmed.

.....

KERNS, J., and WILSON, J., concur.

APPENDIX "D"

COMMON PLEAS COURT OF

MONTGOMERY COUNTY, OHIO

No. 83-2237

BEULAH W. BOOKER, Petitioner,

vs.

EVELYN MOBLEY, M.D., Respondent.

(September 28, 1984)

ORDER

This cause came on to be heard on Defendant's Motion for Summary Judgment. The court finds that said Motion for Summary Judgment was served on Plaintiff, and by Entry filed herein on September 12, 1983, Defendant's Motion for Summary Judgment was set for hearing on September 28, 1984, at 9:30 a.m. The Court further finds that on September 24, 1984, Plaintiff filed a Motion for Extension seeking to postpone the hearing

on Defendant's Motion for Summary Judgment until the Industrial Commission renders a final order on Plaintiff's workers' compensation claim; that on September 26, 1984, Plaintiff filed a response to Defendant's Motion for Summary Judgment captioned "Plaintiff's Motion to Amend, Answer& Judgment"; that Plaintiff was served with a copy of the Entry setting this matter for hearing on September 28, 1984.

The Court finds that Plaintiff's Motion for Extension is not well taken and hereby overrules the same. The Court finds that Defendant's Motion for Summary Judgment is well taken for the reason that Plaintiff's claim against Defendant accured more than one (1) year prior to the filing of the Complaint herein and is barred by the Ohio Statute of Limitatione, Section 2305.11 O.R.C..

It is, therefore, ORDERED, that Defendant's Motion for Summary Judgment be, and the same is hereby sustained, and judgment is hereby rendered in favor of Defendant and against Plaintiff. Costs are taxed to Plaintiff

APPROVED:

John W. Kessler, Judge

Application for Review of the Decision of the Sixth Circuit Court of Appeals-For Want of Subject Matter Jurisdiction.

Sixth Circuit--Case No. 85-3568

Beulah W. Booker, Dayton, Ohio

Petitioner

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